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BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

In the matter of Hearing re California WaterFix Petition for Change

RESPONSE OF CITY OF FOLSOM, CITY OF ROSEVILLE, SAN JUAN WATER DISTRICT AND SACRAMENTO SUBURBAN WATER DISTRICT TO EVIDENTIARY OBJECTIONS AND JOINDER TO SACRAMENTO VALLEY WATER USERS' RESPONSE TO EVIDENTIARY OBJECTIONS

The City of Folsom, City of Roseville, San Juan Water District and Sacramento Suburban Water District hereby incorporated by reference and join in the response to evidentiary objections filed by the Sacramento Valley Water Users.

Additionally, these protestants submit the following responses to the objections filed by DWR and San Luis and Delta-Mendota Water Authority (SLDMWA).

I. DWR'S OBJECTIONS DO NOT JUSTIFY EXCLUDING THE PROFFERED TESTIMONY REGARDING THE PROJECT'S INJURY TO THE PROTESTING AGENCIES

DWR objects to paragraphs 50-56 of the testimony of Shauna Lorance; paragraphs 23, 24 and 26 of the testimony of Robert Roscoe; paragraphs 35-38 of the testimony of Marcus Yasutake; paragraphs 54, 57, 59, 61 and 62 of the testimony of Richard Plecker; and DWR asks the Hearing Officer to exclude or strike this testimony. (DWR's Objections to San Juan Water Dist., p. 2, ll. 15-19; DWR's Objections to Sacramento Suburban Water Dist., p. 3, ll. 5.5-6.5, 18-19; DWR's Objections to City of Folsom, p. 2, l. 27.5 – p. 3, l. 3; DWR's objections to City of Roseville, p. 2, ll. 25 – 27 .) This testimony consists of statements by these witnesses regarding the modeling evidence that DWR has offered and the level to which Folsom Reservoir would be drawn down in future with-project conditions.

DWR's objections are improper, since DWR has not stated a specific basis that would justify exclusion of the proffered evidence. *See generally* SVWU's Response to Department of Water Resources' Master Objections, filed September 30, 2016, esp. p. 2, ll. 2 – 9, and authorities cited therein.[1]

Even if DWR had made specific objections, the evidence is not subject to exclusion under the evidentiary rules of this proceeding. This adjudicative proceeding is not subject to the technical rules of evidence. Rather, it is governed by the evidentiary rules established under the California Administrative Procedure Act, as set forth in Government Code section 11513, and Evidence Code sections 801 through 805. 23 C.C.R. § 648 (SWRCB regulation adopting these evidentiary standards), § 648.5.1 ("Adjudicative proceedings will be conducted in accordance with the provisions and rules of evidence set forth in Government Code section 11513.") The only possible

[1] In the interest of promoting efficiency in these proceedings, the protestants who have joined this response incorporate by reference, in full, the arguments advanced in the Sacramento Valley Water Users' Response to Department of Water Resources' Master Objections, filed September 30, 2016, rather than repeating those arguments here.

basis DWR could be asserting for excluding this testimony would be Government Code section 11513, subdivision (f) (which partially incorporates the provisions of Evidence Code section 352): "The presiding officer has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time."

DWR has made no showing that the probative value of the proffered testimony is substantially outweighed by the probability that it will consume undue amounts of hearing time. Rather, DWR has merely indicated that it disagrees with statements these witnesses have made regarding the modeling evidence DWR presented and the level to which Folsom Reservoir would be depleted in the future when the project is operational. This does not provide a legitimate basis for excluding the testimony. DWR and Reclamation have offered no proposed terms and conditions, or operations plan, to govern how they would actually operate if their pending petition were approved. They have not committed to operate according to their modeling, so all potentially affected water users may assert any possible operation by DWR and Reclamation with Cal WaterFix as a basis for showing their injury by that project. Evidence of Folsom Reservoir being drawn down is relevant to showing injury to the protestants, and this evidence should be considered in the hearing.

Next, DWR asks the Hearing Officer to exclude Mr. Roscoe's testimony regarding his review of the BDCP and California WaterFix draft environmental documents on the ground that it lacks foundation. (DWR's Objections to Sacramento Suburban Water Dist., p. 2, ll. 11-13, 20-21.) This objection is untenable, given that Mr. Roscoe's written testimony indicates that he reviewed the documents that were cited and attached. Moreover, there is no basis for excluding this evidence from this administrative hearing, since DWR has made no showing that the probative value of this testimony is substantially outweighed by the probability that it will consume undue amounts of hearing time.

Similarly, DWR moves to exclude Mr. Roscoe's testimony regarding how reduction in deliveries of supplies from the American River could lead to impacts on groundwater in the Sacramento region on the grounds that it is "irrelevant." (DWR's Objections to Sacramento Suburban Water Dist., p. 3, ll. 22-26.) DWR raises the same objection to Mr. Yasutake's testimony, which it mischaracterizes as a discussion of current operational issues and current conditions that

DWR does not believe are relevant to the Petition. (DWR's Objections to City of Folsom, p. 2, ll. 8.5-10.5.) Even if the technical rules of evidence applied to these proceedings, these objections cannot be sustained. Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Phase 1 of this hearing concerns whether the proposed change will not cause injury to a legal user of water. (Notice, p. 11.) Mr. Roscoe's testimony regarding the potential impacts of the proposed project on the regional groundwater basin and his district's conjunctive use program, and Mr. Yasutake's testimony regarding the injury to the City of Folsom's senior water rights when Folsom Reservoir drops below certain levels, are indisputably relevant to the question of injury. Moreover, again, DWR has made no showing that the probative value of this testimony is substantially outweighed by the probability that it will consume undue amounts of hearing time, so there is no basis for excluding the proffered testimony.

Indeed, as DWR acknowledges, Mr. Yasutake's testimony regarding recent drought operations is offered in the context of giving examples of how low Folsom Reservoir levels put the City's municipal water supply at risk. DWR and Reclamation have not provided an operations plan to demonstrate how the Cal WaterFix project will actually work, nor did they comply with the Hearing Officer's "strong urg[ing]" to submit terms and conditions that would alleviate or avoid potential injury to other legal users of water. Therefore, there is no guarantee that the project will not be operated to create low reservoir levels at Folsom Reservoir, and it is reasonable for Mr. Yasutake and the other agencies that take water directly from the reservoir to testify as to how those operations and low reservoir levels would injure them.

II. SLDMWA'S OBJECTIONS DO NOT WARANT EXCLUSION OF THE PROFERRED EXPERT TESTIMONY OF THE AGENCIES' MANAGERS REGARDING THE INJURIES THAT THE PROJECT WILL CAUSE

SLDMWA makes objections that are parallel to DWR's and stated with more specificity, but are equally infirm. Essentially, SLDMWA's objections challenge the qualifications of the American River Water Agencies' managers to testify about how their agencies' operations would be affected if Cal WaterFix were to cause reduced deliveries to their agencies from Folsom Reservoir. SLDMWA

objects that paragraph 23 of Mr. Yasutake's testimony; paragraphs 54, 65 and 66 of Mr. Plecker's testimony; paragraph 27 of Mr. Roscoe's testimony; and paragraphs 38 and 58 of Ms. Lorance's testimony constitute inadmissible lay witness opinion testimony because these witnesses lack foundation, personal knowledge or expertise regarding how low lake levels pose a threat to their agencies' water supplies. (SLDMWA Objections to Part 1B Parties' Cases in Chief, p. 38, ll. 4-6, 25-27, p. 69, ll. 9-10, l. 69 - p. 70, l. 1, p. 74, ll. 9 -10, 21 -23, p. 76, l. 28 - p. 77, l. 2, p. 78, ll. 4-6.) Despite Mr. Yasutake's, Mr. Plecker's and Ms. Lorance's testimony regarding their participation in operations meetings with Reclamation during the drought to ensure continued deliveries to their agencies, and the risks that low lake levels posed to Reclamation's ability to operate the M&I intake safely that were discussed amongst Reclamation and these agencies, SLDMWA objects that Mr. Yasutake, Mr. Plecker and Ms, Lorance are not qualified to testify regarding these risks. SLDMWA further objects that Ms. Lorance's testimony regarding the physical capacity of the emergency pipeline that was installed to serve her district during the drought constitutes inadmissible lay person opinion. SLDMWA also objects that Mr. Yasutake's and Ms. Lorance's testimony "incorporates hearsay" "because it relies on a statement by someone other than the witness to establish the truth regarding usability of the M&I intake pipe." (*E.g.*, SLDMWA Objections, p. 77, ll. 18-20.)

These objections fail because Mr. Yasutake, Mr. Plecker, Mr. Roscoe and Ms. Lorance all qualify as experts on the topics of their agencies' water operations and management and the conditions that affect their agencies. Any person who has special knowledge, skill, or experience in any occupation or trade may be qualified as an expert in his or her field. *Miller v. Los Angeles County Flood Control Dist.*, 8 Cal. 3d 689, 701 (1973); *see also* Evid. Code § 720(a) (a witness is qualified to testify as an expert if he or she has special knowledge, skill, experience, training or education sufficient to qualify him or her as an expert on the subject to which the testimony relates). A party's representative may also serve as its expert witness. *Douglas v. Ostermeier*, 1 Cal. App. 4th 729, 737 (1991). Under *Schreiber v. Kiser* (1999) 22 Cal.4th 31, 39, non-retained experts such as a party's employees may provide testimony that goes beyond strict observation of events and offers an opinion, as long as the opinion was not formed in anticipation of litigation or in preparation for trial. *Douglas v. Ostermeier*, 1 Cal. App. 4th at 737.

Here, Mr. Yasutake, Mr. Plecker and Ms. Lorance have specialized knowledge, skill and experience in operating and managing the supplies of their water agencies, all of which depend on Reclamation's operations of Folsom Dam and reservoir. As a key part of their regular job duties, they work with Reclamation's Area Office to coordinate operations and ensure successful deliveries to their facilities. They project their customers' demands and provide Reclamation staff with schedules requesting delivery of water, and they work with Reclamation to address any challenges that may arise in delivering water under those schedules. Mr. Roscoe operates a sophisticated conjunctive use program that involves not only water supplies diverted from Folsom Reservoir and the lower American River, but also cooperative groundwater management involving multiple nearby agencies that also pump from a formerly overdrafted basin and the monitoring of contamination plumes. Based on their specialized knowledge, skill and experience, Mr. Yasutake, Mr. Plecker, Mr. Roscoe and Ms. Lorance are all qualified as experts in the operations and management of their water agencies, their water supplies and the conditions that affect those supplies.

To the extent Mr. Yasutake, Mr. Plecker, Mr. Roscoe and Ms. Lorance have relied on technical reports (such as the 1996 report ESA prepared for their agencies) to support their conclusions, this is permissible. Experts may base their opinions on "of a type that reasonably may be relied upon" by experts in that field. Evid. Code § 801(b). The material need not be admissible. *See, e.g., People v. Valdez*, 58 Cal. App. 4th 494, 509 (1997) (police officer properly allowed to rely on hearsay in formulating expert opinions that were used to prove gang enhancement allegations). A scientific report performed by a licensed professional under contract to a public agency is entitled to the presumption of "official duty regularly performed." Evid. Code §§ 664, 195 (public employee includes an agent of a public entity); s*ee Santos v. Dept. of Motor Vehicles*, 5 Cal. App. 4th 537, 547 & n. 6 (1992) (applying presumption that a public employee performs his or her duties in accordance with the law to a blood test report prepared by a licensed forensic laboratory on behalf of a law enforcement agency). Reports produced under such circumstances have the requisite indicia of trustworthiness. Engineers and other water managers routinely and reasonably rely upon expert reports produced by other licensed engineers in making their water management and operations

decisions. Therefore, the agencies' non-retained experts, Mr. Yasutake, Mr. Plecker, and Ms. Lorance, appropriately relied on the 1996 ESA report in formulating their opinions about the effect of lowered Folsom Lake levels on their ability to divert water through the M&I intake at Folsom Dam. They must rely on such reports to manage their agencies' complex operations.

The SLDMWA objections also incorrectly characterize the statements made by Drew Lessard, Reclamation's Central California Area Office Manager, regarding when low lake levels render the M&I intake unsafe to use, as hearsay. While these statements were reported in the testimony of Mr. Yasutake, Mr. Plecker and Ms. Lorance, they constitute admissions of a party to these proceedings. Admission are not hearsay. Evid. Code § 1220. Under this exception, any prior statement of a party may be offered against that party. *People v. Carpenter*, 21 Cal.4th 1016, 1049 (1999) (hearsay exception for admissions is satisfied when evidence consists of a statement, declarant is a party, and statement is offered against that party). Where a party is an entity or organization, it is properly charged with the admissions of its employees and other agents when the statements made are within the agent's express or implied authority. Evid. Code § 1222; *O'Mary v. Mitsubishi Electronics America*, 59 Cal. App. 4th 563, 572, 573 (1997).

As Reclamation's Area Manager of the Mid-Pacific Region's Central California Area Office, Mr. Lessard is responsible for Reclamation programs and facilities in the central part of California, including the American River Division and its Folsom Dam, powerplant and reservoir facilities.[2] In this role, Mr. Lessard is authorized by Reclamation to make statements for Reclamation to the American River Division contractors concerning the operations of Folsom Dam and its associated powerplant and reservoir facilities. Accordingly, the statements made by Mr. Lessard in 2015 (that if Folsom Reservoir's level were projected to drop below elevation 340 feet above msl, or 111,945 acre-feet of storage, at any time, Reclamation would plan to serve limited supplies to the American

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[2] The SWRCB can properly take official notice of these undisputed facts. 23 C.C.R. § 648.2. A copy of Reclamation's May 24, 2013 press release announcing Mr. Lessard's appointment as Area Manager for the Central California Area office is attached. It is also available at www.usbr.gov/newsroom/newsrelease/detail.dfm?RecordID=43225.

River Division contractors through emergency facilities) are properly deemed admissions by Reclamation. *O'Mary v. Mitsubishi Electronics America*, 59 Cal. App. 4th 563, 572, 573 (1997); Evid. Code § 1222. Evidence that squarely fits within a known hearsay exception constitutes "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs" and is properly admissible in formal hearings conducted under the California Administrative Procedure Act. Gov. Code § 11513(c)[3]; *see also* 23 C.C.R. § 648.5.1 (hearsay evidence is admissible in formal hearings before the SWRCB, subject to the provisions of Government Code section 11513).

Under Government Code section 11513(d), hearsay evidence is admissible in adjudicative hearings such as this one "to clarify, explain or supplement" other properly admitted evidence. *See, e.g., Hildebrand v. Department of Motor Vehicles*, 152 Cal. App. 4th 1562, 1572 (2007) (a party's statements are exceptions to the hearsay rule and are properly admitted as admissions under Evidence Code § 1220; under Government Code section 11513, subd. (d), a report is properly admitted to clarify, supplement, or explain a party's own admissions).

The 1996 report that ESA prepared for the cities of Folsom and Roseville and San Juan Water District regarding the danger of the formation of a vortex in the Folsom Dam M&I delivery facilities, and the need to maintain the lake at certain levels to avoid that danger, is admissible. The ESA report supplements and explains Mr. Lessard's statement that the deliveries to the cities of Folsom and Roseville and San Juan Water District would be made through emergency facilities when the lake dropped below 340 feet above msl. Accordingly, it is admissible under the evidentiary rules of this proceeding.

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[3] Furthermore, the ESA report qualifies for the public records exception to the hearsay rule, as it is a report made by an expert under contract with a public entity for use by that entity. Evid. Code § 1280; *Santos v. Dept. of Motor Vehicles*, 5 Cal. App. 4th 537, 547 & n. 6 (1992). A report produced under such circumstances also exhibits sufficient indicia of reliability, and thus may be admissible under Government Code section 11513, subdivision c. *See Davenport v. Department of Motor Vehicles*, 6 Cal. App. 4th 133, 144 (1992) (the presumption that public officials regularly perform their duties gives rise to an inference that official records produced for public agencies are reliable).

Dated: October 19, 2016

Respectfully submitted,

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NEWS & MULTIMEDIA

Drew Lessard Appointed Area Manager for Reclamation's Central California Area Office

Media Contact: Pete Lucero, MP Region Public Affairs Officer, 916-978-5100

For Release: May 24, 2013

FOLSOM, Calif. – David Murillo, Regional Director for the Bureau of Reclamation's Mid-Pacific Region, announces the selection of Drew Lessard as Area Manager for the Central California Area Office, located at Folsom Dam, 23 miles east of Sacramento. As the Area Manager, Lessard is responsible for the operation of Folsom, Nimbus, New Melones and Monticello dams.

"Drew has worked at CCAO since 2000 as a Civil Engineer, as the Deputy Area Manager and most recently as the Acting Area Manager. With his experience, management skills and expertise working with customers and stakeholders, he is the ideal choice for this critical position," stated Murillo.

As Area Manager, Lessard is responsible for Reclamation programs and facilities in the central part of California. CCAO encompasses twelve counties and includes the Central Valley Project's American River Division (Folsom Dam, powerplant and reservoir; Nimbus Dam and powerplant and Lake Natoma), the Auburn-Folsom South Unit (the Auburn Dam site and the Folsom-South Canal), the Eastside Division (New Melones Dam, powerplant and reservoir on the Stanislaus River) and the Solano Project (Monticello Dam, Lake Berryessa and the Putah South Canal).

CCAO's jurisdiction extends from the coast to the crest of the Sierra Nevada and from the American River Basin to the Stanislaus River Basin. CCAO manages recreation at Lake Berryessa and New Melones and has a long-term managing partnership agreement with the California Department of Parks and Recreation for recreation management at Folsom Lake, Lake Natoma and the Auburn Recreation Area.

A federal employee for 19 years, Lessard began his career as an Environmental Engineer for the U.S. Air Force at Holloman Air Force Base, N.M., implementing the Installation Restoration Program. He then worked for the U.S. Forest Service on the Lincoln National Forest in Alamogordo, N.M., as a Civil Engineer responsible for the maintenance and engineering of Forest Service facilities.

Lessard is a graduate of the University of Wyoming with Bachelor and Master of Science degrees in Civil Engineering. He is a registered Professional Engineer. He resides in Folsom, Calif., with his wife Julie and children, Evan and Brennen.

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STATEMENT OF SERVICE

CALIFORNIA WATERFIX PETITION HEARING
Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)

I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

California WaterFix Hearing – Response of City of Folsom, City of Roseville, San Juan Water District and Sacramento Suburban Water District to Evidentiary Objections and Joinder to Sacramento Valley Water Users' Response to Evidentiary Objections

to be served **by Electronic Mail** (email) upon the parties listed in Table 1 of the Current Service List for the California WaterFix Petition hearing, dated October 6, 2016, posted by the State Water Resources Control Board at http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml:

I certify that the foregoing is true and correct and that this document was executed on October 19, 2016.

Signature: Terry M. Olson

Name: Terry M. Olson
Title: Legal Assistant
Party/Affiliation: Cities of Folsom, City of Roseville, Sacramento Suburban Water District, San Juan Water District
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